

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: March 30, 2004

To: The Commission
(Meeting of April 1, 2004)

From: Alan LoFaso, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **AB 2434 (Bates)** - Public Utilities Commission: railroad crossings.
As Amended March 24, 2004

Recommendation:

Summary: This bill would require the Commission to approve, by June 30, 2004, specified pedestrian railroad crossings between a specified portion of beach in the City of San Clemente and the remainder of the City. The project is known as the "San Clemente Beach Safety Enhancement Project."

Digest: Existing Law, Cal. Const. art. XII, sec. 4, provides that the Commission may "establish rules for the transportation of passengers and property by transportation companies." Existing law, Cal. Const. art. XII, sec. 9 restates all related provisions of the Constitution in effect prior to amendments approved by the voters on November 5, 1974 and make no substantive change.

Existing Law, P.U. Code §1201, provides in pertinent part:

No public road, highway, or street shall be constructed across the track of any railroad corporation at grade . . . without having first secured the permission of the commission . . . The commission may refuse its permission or grant it upon such terms and conditions as it prescribes.

Existing Law, P.U. Code §1202, provides in pertinent part:

The commission has the exclusive power:

(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing ...

(b) To alter, relocate, or abolish by physical closing any crossing set forth in subdivision (a).

(c) To require, where in its judgment it would be practicable, a separation of grades at any crossing established and to prescribe the terms upon which the separation shall be made...

This bill would require the Commission to approve, no later than June, 30, 2004, five new one track, public trail-rail crossings at street level, four new one track, public trail-rail grade crossings that go over or under the railroad tracks and improve three existing crossings on the Southern California Regional Rail Authority Orange Subdivision between Mile post 204.0 and 206.0 in the City of San Clemente, Orange County.

This bill would also state legislative findings and declarations that its provisions be enacted because of the existence of special facts and circumstances including, among others:

- A substantial portion of necessary funds will be lost if the project does not obtain necessary regulatory permits and obtain a California Department of Transportation approval for construction funding by June, 30, 2004;
- Essential funding requires the Commission to approve the project prior to June 30, 2004, "subject only to design of rail at-grade crossings in accordance with CPUC adopted engineering standards."

Analysis: According to the author's office, over two million people visit the San Clemente beaches each year, with approximately five to six million trips across the specified railroad track crossings. Many of the current crossings are unsafe and do not have warning devices to alert pedestrians when to cross. To address these and other issues, the City of San Clemente in 1995, started working on a design to improve the railroad crossings, known as the San Clemente Beach Safety Enhancement Project.

The City of San Clemente was awarded a five million dollar Federal Transportation Enhancement Activity Grant from the Department of Transportation for the project, which expires at the end of the current fiscal year (June 30, 2004). The Commission also advised the City of San Clemente to seek approval from the Commission for the project beginning in 2001.

On October 27, 2003, the City of San Clemente filed Application (A.) 03-10-052 with the Commission for authority to construct the crossings. Commission staff, the California Department of Transportation (Cal-Trans) and Burlington Northern Santa Fe Railway (BNSF) protested the City of San Clemente's application with the Commission for safety reasons. According to the Commission's Consumer Protection and Safety Division:

The City's application with the Commission includes both at-grade and grade-separated crossings. The Commission has adopted the policy established by the Federal Railroad Administration of reducing the number of at-grade

crossings. Most collisions involving railroads occur at either at-grade crossings or when pedestrians illegally trespass on the railroad right-of-way (on or near tracks). The policy of reducing at-grade crossings is more vigorously enforced on railroad lines, which are identified as main lines. These lines carry more train traffic at higher speeds than other lines. The railroad tracks at San Clemente Beach are main line tracks. In addition to BNSF freight trains, Amtrak passenger trains and Metrolink Commuter trains travel on this line. Cal-Trans has also designated this line as part of its future high-speed rail corridor. For these reasons, the parties protesting the City's application oppose the proposed number of at-grade crossings and the lack of adequate measures to prevent trespassing. The bill, requiring the Commission to approve the project, is contrary to federal and state safety policy as stated above, and jeopardizes public safety by allowing the City to construct the trail without adequate safety measures against trespassing.

Since the beginning of 2004, CPSD, BNSF (operating freight railroad trains over the tracks), the United Transportation Union (UTU) (representing Amtrak and Metrolink engineers), and the City of San Clemente have been negotiating a settlement for the construction of these crossings and trails.

CPSD states that the City created its own urgency funding deadline when it failed to file an application with the Commission in a timely manner, despite meetings with the Commission staff on various occasions since 2001 concerning this project. During these meetings, the Commission staff repeatedly informed the City of the length of time (up to 18 months) required for Commission action. Nonetheless, the City waited until October 2003 before finally filing its application with the Commission and chose to ignore all of the preapplication recommendations made by staff and the railroad agencies because (as the City stated in its application) "The City is unsure that if we changed the project to meet some or most of their concerns, it will change their opinion toward the project. This being the case, the City staff is not recommending any change to the project." In a Pre-hearing Conference, the attorney for the City stated on record that federal funding for the project might be jeopardized if Commission approval for the project was not granted by April 30, 2004 (which is inconsistent with the June 30, 2004 deadline stated in the bill). Being aware of the funding deadlines and the amount of time for Commission action on the application, the City could have and should have filed its application with the Commission at least one year earlier. According to CPSD, this bill grants extraordinary and uncalled for dispensation to the City for its failure to file a timely application, and unfairly moves its application ahead of others.

LEGAL IMPACT

The Commission is a regulatory body of constitutional origin. *The People ex rel. Public Utilities Commission v. City of Fresno* (5th DCA 1967) 254 Cal. App.2d 76.¹ The bill

1 " . . . The commission fulfills a vital and significant role in the scheme of government. In fact, it is the only public agency which is constitutionally constructed to protect the public from the consequences of monopoly in public

may conflict with two sections of the California Constitution insofar as it may limit the Commission's present constitutional authority.

Section 22 of article XII of the California Constitution: The California Constitution provides the Commission with jurisdiction over railroads and all other transportation companies within the state. In *Western Assn. of R.R. v. Railroad Com.* (1916) 173 Cal. 802, the California Supreme Court held that the Commission's jurisdiction covered all "transportation companies". "It must be and therefore is held that the constitution has granted regulatory powers over such corporations to the railroad commission² by virtue of section 22, article XII, of the constitution, and it follows herefrom that mandate should issue to the railroad commission to exercise such powers." *Western Assn. of R.R. v. Railroad Com.*, supra, at p. 808. While section 22 of article XII of the California Constitution adopted in 1879 was repealed in 1974, its provisions continue in section 9 of article XII which reincorporates the provisions of section 22. "The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change [emphasis added]." (Section 9 of article XII.) Section 9 was approved in 1974 simultaneously with the repeal of section 22.

Section 4 of article XII of the California Constitution: This section provides that the Commission may "establish rules for the transportation of passengers and property by transportation companies." The Commission's Rules of Practice and Procedure, Title 20, California Code of Regulations, sections 38 through 41, provide rules and requirements for the construction of railroad crossings. The Commission has long regulated pedestrian and vehicle crossings in California.³

Thus, the Commission's powers over transportation companies such as railroads are constitutionally based and, therefore, may not be amended without amendment to the constitution itself. See *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621 at 634. To the extent that street/rail crossing rules concern the rules, regulation and safety of a transportation company such as a railroad, the Commission's jurisdiction is

service industries (Citations omitted). However, the primary function of the commission is to regulate private property dedicated to a public use and to exercise control over private companies engaged in public service (Cal. Const., art. XII, § 23; citations omitted.) Moreover, as a regulatory body of constitutional origin it has only such powers as it derives from the Constitution and from the Legislature (Cal. Const., art. XII, § 23; citations omitted)." *The People ex rel. Public Utilities Commission v. City of Fresno*, supra, 254 Cal. App.2d 76 at 80-81. See also: *County of Inyo v. Public Utilities Com.* (1980) 26 Cal. 3d 154, 176, n.5, "The 1911 constitutional amendments modified article XII, section 23 to permit the Legislature to grant the Railroad Commission, whose jurisdiction had previously been limited to transportation companies, jurisdiction over many other forms of public utilities including water companies. The amendments also modified section 22 to restate the powers of the Railroad Commission and authorized the Legislature to grant it additional powers."

² In 1946 the Railroad Commission of the State of California became the Public Utilities Commission.

³ See e.g., *Application of City of San Clemente to modify D. 91859, as modified by D. 92226 (City of San Clemente)*, to construct the protected public pedestrian and limited access vehicular at grade crossing of Santa Fe Railway Co. at the proposed new location granted. Decision No. 93547, Case No. 55451. 1981 Cal. PUC LEXIS 1164; 6 CPUC2d 765.

constitutionally protected from legislation which would remove or restrict the Commission's review and jurisdiction required under the California Constitution.

Statutory Conflict: In addition to these constitutional arguments against the bill, the substance of the bill with respect to the San Clemente pedestrian railroad crossings raises issues of statutory inconsistency and vagueness. Cal. Pub. Util. Code §§ 1201 and 1202 delegate the responsibility for ensuring safe design, construction, location, and operation of rail crossings to the Commission. On the other hand, the bill states that the City's proposed crossings "shall be approved . . . by the Public Utilities Commission in accordance with the provisions of this section" which states at its beginning, "Notwithstanding any other provision of law." Thus, the Legislature has directed the Commission to both "determine the and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing" (Cal. Pub. Util. Code §§ 1201 and 1202) while at the same time "approv[ing]" the City's crossings (Cal. Sts. & Hy. § 2454.3) apparently without safety review and analysis. Therefore, the bill would enact contradictory provisions. If the Commission has safety concerns about the City's crossings and trails near these railroad tracks used by high-speed freight and passenger trains, it will have to both reject and approve the crossings under these two contradictory statutory provisions.⁴ Moreover, the bill's provision may also be internally inconsistent.⁵

Private Legislation: Finally, the bill deprives interested parties such as the BNSF, the UTU, and Cal-Trans from raising its concerns about the City's crossings in a proceeding presently before the Commission. These parties effectively would be denied due process. Further, there is the question of whether this is a form of private legislation promoted by the City to circumvent the review of the Commission and the related proceeding before the Commission.

Patrick Berdge of the Commission's Legal Division provided this legal impact analysis in this memo.

Suggested Amendments

The Legal Division proposes the following amendments to avoid any statutory conflict. This amendment, however, would not correct the constitutional conflict. This suggested amendment would require the Commission to approve specified railroad crossings in

⁴ Of course, the previously mentioned constitutional arguments precluding the Legislature from restricting Commission safety review of the San Clemente crossings remain.

⁵ Whether the bill actually proposes to preempt Commission safety review is not clear since in subsection (a) of 2454.3, the bill states that the Commission shall approve the crossings while in subsection (b)(7), the bill states that the crossings shall be approved "subject only to design of rail at-grade crossings in accordance with CPUC adopted engineering standards." If it is the Legislature's intent to preserve the Commission's safety review, the Commission cannot "approve" the crossings if they are not in accordance with CPUC adopted engineering standards.

the City of San Clemente on or before June 30, 2004, so long as the design of these crossings are in accordance with CPUC adopted engineering standards.⁶

Proposed Streets and Highways Code section 2454.3(a) should be amended to read (on page 2, lines 3-14):

~~Notwithstanding any other provision of law, t~~ The planned construction of five new one track, public trail-rail crossings at grade, four new one track, public trail-rail grade separated crossings, and the improvement of three existing crossings on the Southern California Regional Rail Authority Orange Subdivision between Mile post 204.0 and 206.0 in the City of San Clemente, along with the construction of associated new barriers and new public trails, and all necessary associated work and appurtenances, all of which construction is part of the City of San Clemente Beach Safety Enhancement Project, shall be approved on or before June 30, 2004, by the Public Utilities Commission, so long as the design of these crossings are in accordance with CPUC adopted engineering standards.

LEGISLATIVE HISTORY

Asm. Trans.: 11-0 (Do pass); 14-0 (Reconsideration without prejudice granted) (3/22/04)

SUPPORT/OPPOSITION

Support: City of San Clemente, Sierra Club.

Opposition: Burlington Northern and Santa Fe Railway.

LEGISLATIVE STAFF CONTACT

Alan LoFaso, Legislative Director
CPUC-OGA

alo@cpuc.ca.gov
(916) 327-7788

Matthew Marcus, Legislative Liaison
CPUC-OGA

mnm@cpuc.ca.gov
(916) 327-3455

Date: March 30, 2004

6 See Section 2454.3(b)(7):

"In order to ensure that the essential funding is not lost, the Legislature finds and declares that the Public Utilities Commission needs to approve the Beach Safety Enhancement Project prior to June 30, 2004, subject only to design of rail at-grade crossings in accordance with CPUC adopted engineering standards [emphasis added]."

BILL LANGUAGE:

BILL NUMBER: AB 2434 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY MARCH 24, 2004

INTRODUCED BY Assembly Member Bates
 (Principal coauthor: Assembly Member Jackson)
 (Principal coauthor: Senator Morrow)
 (Coauthors: Assembly Members Harman, Maze, Pavley, and
Spitzer)
 (Coauthor: Senator ~~Morrow~~ Johnson)

FEBRUARY 19, 2004

An act to add Section 2454.3 to the Streets and Highways Code, relating to railroad crossings, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 2434, as amended, Bates. Public Utilities Commission: railroad crossings.

Existing law prohibits the construction of any railroad crossing without the permission of the Public Utilities Commission.

This bill would require the commission to approve specified railroad crossings in the City of San Clemente on or before June 30, 2004.

This bill would declare that it is to take effect immediately as an urgency statute .

Vote: 2/3. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2454.3 is added to the Streets and Highways Code, to read:

2454.3. (a) Notwithstanding any other provision of law, the planned construction of five new one track, public trail-rail crossings at grade, four new one track, public trail-rail grade separated crossings, and the improvement of three existing crossings on the Southern California Regional Rail Authority Orange Subdivision between Mile post 204.0 and 206.0 in the City of San Clemente, along with the construction of associated new barriers and new public trails, and all necessary associated work and appurtenances, all of which construction is part of the City of San Clemente Beach Safety Enhancement Project, shall be approved on or before June 30, 2004, by the Public Utilities Commission in accordance with the provisions of this section.

(b) The Legislature hereby finds and declares that it is necessary to enact the provisions of this section regarding the City of San Clemente Beach Safety Enhancement Project because of the existence of

the following special facts and circumstances:

(1) There is substantial pedestrian traffic between the greater part of the City of San Clemente and the adjacent public beaches which must cross the railroad tracks of the Orange County Transportation Authority, totaling as many as 4.6 million pedestrian crossings a year, the vast majority of which occur at unimproved crossings ~~without~~ lacking adequate safety devices.

(2) The use of these unimproved crossings is a significant danger to the public in view of the substantial rail traffic over the Orange County Transportation Authority Orange Subdivision, consisting of over 50 trains per day at this time.

(3) The creation of safer crossings to preserve public beach access while reducing the risk to pedestrians is necessary to protect the public.

(4) The project will, in fact, eliminate many of the existing unsafe crossings, and direct pedestrian traffic to improved crossings with standard pedestrian crossing warning devices.

(5) The City of San Clemente, pursuant to its obligation to facilitate public beach access under the California Coastal Act, has designed a Beach Safety Enhancement Project to provide a number of safe crossings for pedestrians, and has sought the necessary funding for the project from state and federal sources.

(6) A substantial portion of the necessary funding for the Beach Safety Enhancement Project will be lost if the project does not obtain the required regulatory permits and obtain a California Department of Transportation approval for construction funding by June, 30 2004.

(7) In order to ensure that the essential funding is not lost, the Legislature finds and declares that the Public Utilities Commission needs to approve the Beach Safety Enhancement Project prior to June 30, 2004, subject only to design of rail at-grade crossings in accordance with CPUC adopted engineering standards.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to immediately preserve the funding for the San Clemente Beach Safety Enhancement Project and to protect members of the public from risk of bodily harm in attempting to access public beaches through the use of unimproved, railroad crossings, it is necessary that this act take effect immediately.